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No. 06-87

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In The

Supreme Court of the United States

GREG ALAN MORGAN,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

MELBOURNE B. WEDDLE
Counsel of Record
LAW OFFICES OF
MELBOURNE B. WEDDLE
P. O. Box 593
Santa Barbara, CA 93102
(805) 966-1038

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT IN REPLY TO OPPOSITION

Respondents' brief in opposition (Opp.) consists almost entirely of an effort to recast the issues in this case. The two issues currently before this Court are questions of law; hence, the trial court's facts, the facts repeated by Respondents are not facts in any sense of the word, but are judicially created by the trial court and are largely irrelevant. Respondents nevertheless devote a substantial portion of their opposition to the supposed "facts" of this case, "facts" which in reality are merely a collection of *allegations* extracted from the original complaint, the amendment of which is at issue. These allegations are not only irrelevant as a matter of *law*; they are profoundly inaccurate as a matter of *fact*.

FIRST QUESTION

Respondents cannot and do not dispute this exceedingly important issue presented to this Court. Respondents barely touch the issue as presented by petitioner but rather recast the issue[1] more to their hearts' desire, then wrongly assert that this case is not the "proper vehicle" for

[1] Petitioner presented this question as: "Whether the court of appeals erred in concluding that this Court's decision in *Foman* v. *Davis*, 371 U.S. 178 (1962) grants courts discretion to deny an amendment asserted under the first sentence of Fed.R.Civ.P. 15(a)?" and Respondents recast the question as: "Whether the court of appeals properly held that its prior ruling affirming the dismissal of all but one claim, and remanding only that claim for further development of the factual record, precludes petitioner's attempt to relitigate the dismissed claims or to raise new claims that could have been raised in the original complaint." Pet. i and Opp. I.

such resolution and do so upon multifarious circularities. Opp. 10.

Respondents concede the trial court denied petitioner his right to amend upon its "dismissal * * * 'with prejudice'" as well as every subsequent effort, yet argue, the issue was "rendered moot" because petitioner was "ultimately permitted" by leave of the "district court's order" to amend. Respondents' conflicting assertions are contrary to the express terms of the first sentence of Fed. R. Civ. P. 15(a) which provides a party's right to amend "once"; not by "leave," but at "any time," chosen by a party[2] and not by the trial court. Opp. 9.

Respondents concede that the Ninth Circuit "affirmed [the trial court's dismissal] in every respect," which included the denial of the right to amend the complaint, yet argue that the "decision does not address Rule 15(a)." Opp. 9. Respondents' conflicting assertions are contrary to their statements acknowledging that the trial court denied the right "with prejudice," the Ninth Circuit "affirmed" that denial "in every respect," then upon remand; the trial court struck the amended complaint; then granted an amendment; struck that amendment then "ultimately permitted" an amendment and then declared the amendment void as precluded by mandate, the law of the case and *res judicata*. Pet. App. 29 ¶¶ 3-4. On appeal again, the Ninth Circuit declared the amended complaint was barred by *res judicata* even though this action is an unbroken single numbered ongoing lawsuit. All of which occurred

[2] Petitioner raised the issue at every stage of the litigation below and the issue was argued extensively in the trial court and in the Ninth Circuit.

because of petitioner's efforts to enforce his right pursuant to the first sentence of Rule 15(a). Opp. 10.

Respondents concede that "petitioner's right to amend his complaint as of right was terminated" by the trial court yet argue, the "Ninth Circuit's rule * * * is *more favorable* to petitioner than the rules of the other courts."[3] Opp. 10, emphasis in original. Respondents' conflicting assertions are contrary to the express terms of Rule 15(a)'s first sentence and the statement of this Court in *Mayle* v. *Felix*, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005) (*Mayle-Felix*) which rejected the notion that a trial court possesses the discretion to override "a pleader's right to amend without leave of court."[4] *Id.* at 2574.

Respondents concede that "'res judicata' is generally used * * * on a subsequent action * * * " and the Ninth Circuit erred in applying it to this case, yet argue that the law of the case prevents the petitioner from amending his complaint as a matter of right under the first sentence of the rule. Opp. 11. Respondents' conflicting assertions are contrary to Rule 15(a). The doctrine of the law of the case is not inflexible. It is a doctrine of convenience and utility.

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[3] Respondents posit that half a right is better than none.

[4] Respondents' assertion that "petitioner would not benefit from adoption of one of the rules applied in the other circuits" is accurate, however, irrelevant to the issue. Petitioner rather embraces the first sentence of Rule 15(a) and this Court's statement in *Mayle-Felix* demonstrating the various circuits amendment policies as evolved since *Foman-Davis*'s second sentence Rule 15(a) determination differ materially on the precise meaning of the rule and particular to this action, the Ninth Circuit's discretionary policy granting a trial court the power to deny the right. Where a party has the right to file an amendment as a matter of course, under the plain language of Rule 15(a), the courts lack discretion to reject an amendment based upon any apprehended futility.

The doctrine yields to the law and to reason. The Federal Rules of Civil Procedure are part of and integrated into the law of the case. The doctrine yields to Rule 15(a). Petitioner had an absolute right to cure the defects by an amendment and at a time meaningful "to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

SECOND QUESTION

Again, Respondents recast the issue[5] more to their hearts' desire, then wrongly assert the trial court's "fact-bound determination would not warrant this Court's review" which in reality are merely a collection of *allegations* extracted from the original complaint, the amendment of which is at issue.

Respondents have provided no persuasive contrary argument or identified any compelling government interest as to why this Court's existing Fourth Amendment administrative jurisprudence should not apply to this issue. Again, the purpose of these administrative stops serves two principle objectives; the first is to prevent undesirables from entering the *Installation,* and the

[5] Petitioner presented this question as: "Whether the court of appeals erred in holding that "military bases" are exempt from the probable cause requirement of Fourth Amendment of the United States Constitution?" and Respondents recast the question as: "Whether petitioner, by driving into the guarded entry gate area of a closed military base, after having been warned by signs and by his superiors that he and his vehicle would be subject to search when on or entering the base, impliedly consented to the search of his vehicle." Pet. i and Opp. I.

second is to create the opportunity to initiate a consent search with the stated goal of keeping drugs away from the *Installation*. See Pet. App. 70-72.

At least one federal court has applied the test announced in *Brown* v. *Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979) (*Brown*) to these "administrative searches." Building upon the *state court judgment in this case* (Pet. App. 59-60), the court in *United States* v. *Charrington*, 285 F. Supp. 2d 1063 (S.D. Ohio 2003) (*Charrington*) rejected the Ninth Circuit's "implied consent rationale" announced here upon recognition of the flaws in the first opinion. See Pet. App. 6-15. The defendant in *Charrington* was arrested and charged with possession of marijuana outside of an *Installation* entry gate.[6]

Applying the three-part *Brown* test, the *Charrington* court firstly held that "implied consent" cannot justify a "prolonged detention" like the instant case, more than 30 minutes. The *Charrington* court secondly stated that "*the decision* [here] *purported to follow Jenkins and Ellis, but those cases were inapposite* upon recognition that both defendants in *United States* v. *Jenkins*, 986 F.2d 76 (4th Cir. 1993) (*Jenkins*) and *United States* v. *Ellis*, 547 F.2d 863 (5th Cir. 1977) were *inside the Installation*. The *Charrington* court thirdly analyzed the policy implementing these "administrative searches" granting deference to the policy, however, finding that the policy was substantially violated; thus infringing the Fourth Amendment. See *Charrington*, 285 F. Supp. 2d at fn. 3. Respondents argue and advocate precisely the opposite result determined by

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[6] Possession of such was criminal, whereas petitioner's unloaded handgun was not and petitioner was as well a member of the base sponsored gun club and shooting ranges.

the *Charrington* court which followed *Brown*. See *Charrington*, 285 F. Supp. 2d at 1067.

Notably absent from the trial court's implementation of the concept of "implied consent," the Ninth Circuit's affirmation of that result and Respondents' argument is any evaluation, let alone consideration, of the Air Force's policy effecting these administrative searches. These administrative searches would be consistent with the Fourth Amendment if they are "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown*, 443 U.S. at 51. The linchpin of Respondents' argument is the trial court's constricted "totality of the circumstances" view, ultimately extracted from *Jenkins*, placing exclusive reliance upon contested visual indicia to sustain its summary adjudication without consideration of the Air Force's policy.[7] "The configuration of the guard gate clearly would have suggested to any *reasonable individual* that it was a secured entrance." Opp. 14 and Pet. App. 27 ¶ 16, emphasis added.

The Ninth Circuit not only embraced this concept of imagery to vitiate the Fourth Amendment but substantially expanded upon it, by enveloping areas outside of the *Installation*, not secured and contrary to this Court's holding in *Flower* v. *United States*, 407 U.S. 197, 198 (1972), as well as *Greer* v. *Spock*, 424 U.S. 828, 835 (1976).[8]

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[7] Respondents erroneously declare the existence of a "summary judgment record" when in fact the trial court entered summary adjudication. Opp. 14.

[8] Respondents wrongly assert that the record below does not contain references to the status of the highway open to the public. Opp. 14. Petitioner supplied both the trial court and the Ninth Circuit with copies of the Base Newspaper quoting Base Law Enforcement Officials declaring the status of the highway. This was one of the objects of petitioner's request for judicial notice, denied. Pet. fn. 10.

This concept of imagery as the end all for "implied consent" turns the Fourth Amendment on its head – it eliminates the test of whether actions taken by the government were reasonable[9] and grants the government an unfettered right to arrest, search and seize so long as the proscribed visual indicia's are present at a given location, e.g., an unequivocal "welcome sign."

Respondents' *characterization* of petitioner's anticipated awareness of an unequivocal "welcome sign" bears scant resemblance to reality, or to the facts in this case, but rather represents an inflated portrayal of one side's assertions, not tested by what should have been the operative complaint – the first amended complaint. Importantly, Respondents' *characterization* does not diminish the need to resolve the important Fourth Amendment question, but rather amplifies the need.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MELBOURNE B. WEDDLE
Counsel of Record
LAW OFFICES OF
MELBOURNE B. WEDDLE
P. O. Box 593
Santa Barbara, CA 93102
(805) 966-1038

[9] The trial court confused the standard of "reasonableness" with "privacy" and placed the entire burden of the existence or non-existence of "implied consent" upon, e.g., a traveler who by happenstance crosses a federal property line dominated by an unequivocal "welcome sign."